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IN THE

Supreme Court of the United States

JAMES W. ZIGLAR,
Petitioner,

v.

AHMER IQBAL ABBASI, ET AL.,
Respondents.

(CAPTION CONTINUED ON INSIDE COVER)

On Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN IMMIGRATION COUNCIL, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NATIONAL POLICE ACCOUNTABILITY PROJECT, AND NORTHWEST IMMIGRANT RIGHTS PROJECT AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* [1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately 750,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America's entry into World War I. In the intervening eight decades, the ACLU has frequently appeared before this Court during periods of national crisis when the government has abridged individual rights in the name of national security and immigration enforcement. The ACLU has extensive expertise on the issues raised by the *Bivens* question before this Court. The ACLU filed an amicus brief in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) itself, and has litigated numerous other *Bivens* cases before this Court and the lower courts.

The American Immigration Council ("the Council") is a national non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently

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[1] All parties have consented to the filing of all amicus briefs. No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

appears in federal courts on issues relating to available remedies when immigration officers engage in unlawful and unconstitutional conduct, and undertakes research and advocacy related to the accountability of immigration enforcement agencies and personnel.

The National Immigration Project of the National Lawyers Guild ("NIPNLG") is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrant rights. Over the last several years, through litigation and advocacy, NIPNLG has worked to promote government accountability for abuse and misconduct by immigration officials against noncitizens and individuals perceived to be noncitizens. To address these issues, NIPNLG represents select victims of immigration abuse and misconduct, appears as amicus curiae before federal courts, provides technical assistance, issues practice advisories, and conducts continuing legal education seminars. NIPNLG has a direct interest in ensuring that noncitizens are not unduly prevented from pursuing remedial suits in response to unconstitutional action by federal immigration officers.

The National Police Accountability Project ("NPAP") was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law enforcement and corrections officers by coordinating and assisting civil rights lawyers. The project presently has more than 550 attorney members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information on issues related to

misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability, and appears as amicus curiae in cases, such as this one, that present issues of particular importance for the clients of its lawyers, *i.e.*, clients injured by law enforcement use of force.

The Northwest Immigrant Rights Project ("NWIRP") is a Washington State nonprofit organization that promotes justice by defending and advancing the rights of immigrants through direct legal services, systemic advocacy, and community education. NWIRP strives for justice and equity for all persons, regardless of where they were born. With over 35 attorneys and legal workers, NWIRP provides direct representation to low-income immigrants who are placed in removal proceedings and to those who face abuse and mistreatment by immigration officers. NWIRP has represented numerous victims of unconstitutional acts by border patrol agents and has a direct interest in the outcome of this case.

SUMMARY OF ARGUMENT

Amici write to address the first of three issues presented in the petition for *certiorari*: whether *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), provides a cause of action for Respondents' claim that the punitive and abusive mistreatment inflicted upon them while they were detained in a federal correctional facility was unconstitutional.

The breadth of the Petitioners' position is startling. They claim that no *Bivens* remedy is available because this case involves high-level policy decisions and touches on issues of national security and immigration. That proposed rule would effectively immunize tens of thousands of federal officers, and large swaths of federal law enforcement activity, from damages, no matter how egregious the officers' conduct. Indeed, Petitioners' position would effectively immunize federal officers from damages liability even for torture, so long as the torture arises in a context involving national security or noncitizens.

This Court should reject that extreme position and affirm the critical importance of a *Bivens* remedy in deterring unconstitutional conduct and enforcing constitutional rights. As the Court explained in first recognizing the *Bivens* cause of action to remedy violations of constitutional rights, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Bivens*, 403 U.S. at 397 (quoting *Marbury v. Madison*, 1 (Cranch 137), 163 (1803)).

Contrary to Petitioners' assertions, the Court need not break new ground to recognize a *Bivens* remedy in this case. Respondents' due process and equal protection challenges to the unconstitutional conditions of their confinement in a federal facility are clearly analogous to the claims that gave rise to *Bivens* actions in *Carlson v. Green*, 446 U.S. 14 (1980) and *Davis v. Passman*, 442 U.S. 228 (1979). For this reason alone, the Court should find a *Bivens* cause of action here.

Even if the Court determines that Respondents' claims present a new context, however, a *Bivens* cause of action should be recognized in this case. To be sure, the Court has declined to recognize the availability of a *Bivens* cause of action where the plaintiff can pursue an alternative remedial scheme established by Congress, or in the presence of "special factors" that counsel against the recognition of a cause of action. *See, e.g., Chappell v. Wallace*, 462 U.S. 296, 303-04 (1983). But neither of those exceptions to *Bivens* liability are present in this case.

Respondents have no recourse to any alternative remedial scheme. In contrast to other cases in which this Court has declined to find a *Bivens* cause of action, here Congress has neither provided an alternative remedy nor given any indication that the judiciary should deny *Bivens* relief. *Cf. Bush v. Lucas*, 462 U.S. 367, 388 (1983). To the contrary, the INA confirms that Congress intended to preserve a *Bivens* action in these circumstances. The statute setting forth the powers of immigration officers, 8 U.S.C. § 1357(g)(8), contemplates the availability of such a remedy. Congress similarly preserved a *Bivens* remedy when, in enacting the Westfall Act, it rejected executive branch proposals to eliminate *Bivens* liability and instead left intact constitutional tort remedies against federal officials, while displacing state law tort remedies. *See* 28 U.S.C. § 2679(b)(1). In any event, the Immigration and Nationality Act (INA) is not a substitute for *Bivens* because it provides no mechanism to deter constitutional violations or compensate victims. And this Court has previously held that the Federal Tort Claims Act

(FTCA) is not a substitute for *Bivens*. *Carlson*, 446 U.S. at 20-23. Thus, absent a *Bivens* action, Respondents have no adequate remedy.

Nor are there any "special factors" in this case that counsel against recognizing a *Bivens* cause of action. To the contrary, the context in which this claim arises strongly favors such a cause of action. "The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). Petitioners cite immigration, national security, and high-level policymaking as "special factors," but offer no explanation for why any of these considerations would justify detaining noncitizens based on their ethnicity or religion, slamming detainees into walls, or otherwise subjecting them to abusive conditions of confinement. The deterrent effect of *Bivens* suits is all the more important for noncitizens, who, as history shows, have been frequent targets of discrimination, and against whom federal officers have committed egregious violations of individual rights in the name of "national security" or "public safety" concerns. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

Federal courts have adequate tools at their disposal to curtail suits against officers who acted reasonably in specific circumstances. Most importantly, qualified immunity shields federal officials who do not violate

clearly established constitutional rights, even if they act unconstitutionally. *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009). The courts also have a variety of means to protect the government's interest in national security information that may be relevant to a *Bivens* action. These include the state-secrets privilege, *in camera* review of classified documents, and requiring counsel to obtain security clearances. These methods allow a court to carefully balance, in a particular case, the government's legitimate interests with the plaintiff's need for compensation and the societal interest in deterring constitutional violations.

Denying a *Bivens* remedy altogether, by contrast, is an unnecessarily overbroad, blunderbuss approach that allows for no such balance. The Court should reject a rule that would allow federal officers to commit egregious unconstitutional acts with impunity and would deny innocent victims any possibility for redress.

ARGUMENT

"*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson*, 446 U.S. at 18. If a *Bivens* claim arises in a context for which this Court has previously granted a remedy, then a *Bivens* remedy is appropriate and no further inquiry is necessary. When deciding whether to apply *Bivens* to a new context, the Court applies a two-step test. *See, e.g., Wilkie v. Robbins*, 551 U.S. 537, 549-50 (2007). First, the Court determines whether an "alternative, existing process for protecting the [constitutionally recognized] interest amounts to a

convincing reason for the Judicial Branch to refrain from providing" a separate *Bivens* remedy. *Minneci v. Pollard*, 565 U.S. 118, 122-23 (2012) (quoting *Wilkie*, 551 U.S. at 550) (alteration in original). When no such alternative exists, the Court proceeds to the second step, in which it makes "the kind of remedial determination that is appropriate for a common-law tribunal," albeit one that pays "particular heed" to "any special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.* (quoting *Wilkie*, 551 U.S. at 550).

Applying that test, a *Bivens* cause of action should be available to Respondents in this case. First, their claim challenging federal agents' unconstitutional mistreatment of prisoners presents a familiar context to which this Court and numerous lower courts have readily extended *Bivens*. Second, there is no alternative remedial scheme that would provide redress for the violation of Respondents' due process and equal protection rights. Third, there are sound reasons to recognize a *Bivens* cause of action in this case, and there are no "special factors" weighing against such recognition.

I. Respondents' Unconstitutional Treatment of Prisoners in Federal Custody Does Not Extend *Bivens* into a New Context.

Respondents' due process and equal protection claims are rooted in a context long-recognized by this Court as giving rise to a *Bivens* cause of action: federal officers' gross mistreatment of individuals in their custody. In *Carlson*, this Court held that a prisoner had a *Bivens* cause of action against federal prison officials

who violated his Eighth Amendment rights by disregarding the medical advice of his doctors and his need for competent medical treatment. 446 U.S. at 16 n.1, 17-18. Over two decades later, the Court affirmed the availability of a *Bivens* cause of action for unconstitutional treatment claims against federal officers when it acknowledged that "a federal prisoner in a BOP facility [who] alleges a constitutional deprivation ... may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity." *Malesko*, 534 U.S. at 72; *see also Sell v. United States*, 539 U.S. 166, 193 (2003) (Scalia, J., dissenting) (*Bivens* action "is available to federal pretrial detainees challenging the conditions of their confinement.").

The Courts of Appeals routinely have recognized that *Bivens* reaches allegations against federal officials for their mistreatment of individuals in federal custody. *See, e.g., Bistrian v. Levi*, 696 F.3d 352, 377 (3d Cir. 2012) (denying prison officials' motion to dismiss Fifth Amendment *Bivens* claims where prison officials exposed detainee to danger of inmate assault); *Thomas v. Ashcroft*, 470 F.3d 491, 497 (2d Cir. 2006) (finding *Bivens* allegations sufficient where detainee alleged that prison officials "knew of his urgent medical needs but ignored them, and nevertheless ordered or acquiesced in his transfer to a facility where he received no medication..."); *Young v. Quinlan*, 960 F.2d 351, 360-64 (3d Cir. 1992) (reversing summary denial of Eighth Amendment claims of inadequate protection and conditions of confinement); *Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1991) (finding error in dismissal of

Fifth Amendment *Bivens* claims against prison officials over allegedly discriminatory adverse actions); *Cale v. Johnson*, 861 F.2d 943, 948 (6th Cir. 1988) (recognizing *Bivens* claims where disciplinary action taken in retaliation for inmate complaints about food); *Cleavinger v. Saxner*, 474 U.S. 193, 206-07 (1985) (affirming denial of Fifth Amendment *Bivens* claims against members of disciplinary committee on qualified immunity grounds).

Similarly, the availability of a *Bivens* cause of action for equal protection claims is well-settled. *See Davis*, 442 U.S. at 230 & n.3 (recognizing *Bivens* action for equal protection claim stemming from U.S. Congressman's termination of employee based on her sex); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (expressing no doubt as to the viability of a well-pleaded equal protection claim for the mistreatment of detainees directed by high-level officials in post-9/11 investigation).

It makes no difference that Respondents here are noncitizens. They enjoy the same constitutional protection against mistreatment and discrimination while in federal custody as citizens, and there is no principled reason to deny them the same constitutional remedy to which citizens are entitled. Courts of appeals have accordingly recognized noncitizens' ability to sue under *Bivens* to deter violations of their constitutional rights and to receive compensation when those rights are violated. *See, e.g., Martinez-Aguero v. Gonzales*, 459 F.3d 618, 625 (5th Cir. 2006) (holding *Bivens* available where INS officer beat and yelled profanities at a defenseless noncitizen without provocation); *Papa v. United States*, 281 F.3d 1004, 1010-11 (9th Cir. 2002)

(reversing district court dismissal of *Bivens* claim where federal officers "knowingly plac[ed] [immigration detainee] in harm's way"); *Franco-de Jerez v. Burgos*, 876 F.2d 1038, 1039, 1042-43 (1st Cir. 1989) (allowing case to proceed to discovery against immigration officer on *Bivens* claim where noncitizen was held incommunicado for over ten days); *cf. Humphries v. Various Fed. USINS Emp.*, 164 F.3d 939, 944 (5th Cir. 1999) (reversing dismissal of damages suit against INS and FBI officials involving claims under the Thirteenth and Fifth Amendments); *Matter of Sandoval*, 17 I. & N. Dec. 70, 82 (BIA 1979) (citing *Bivens* for the proposition that "civil or criminal actions against the individual officer may be available.").

II. There Is No Alternative Remedial Scheme to Redress Respondents' Claims of Unconstitutional Treatment While in Federal Custody.

Even if the Court determines that Respondents' claims present a new context, the Court should recognize that a *Bivens* cause of action is available in this case. Respondents' claims unquestionably satisfy the first step of the inquiry: there is no alternative remedial scheme through which Respondents can seek redress for the violation of their constitutional rights under federal or state law. "For [Respondents], as for Bivens, it is damages or nothing." *Malesko*, 534 U.S. at 72 (quoting *Davis v. Passman*, 442 U.S. at 245).

A. There Is No Alternative Remedy Under Federal Law.

First, there is no alternative method under federal law through which Respondents can receive any compensation for the violation of their rights. That sets this case apart from those cases in which this Court has declined to recognize a *Bivens* remedy because of the availability of an alternative remedial scheme.

No such alternative federal remedial scheme exists in this case, and Petitioners do not meaningfully contend otherwise. Certainly, the INA does not offer any adequate remedy. Indeed, in the INA itself, Congress contemplated the continued availability of a *Bivens* remedy. In the INA, Congress established a framework for allowing state officers to act as immigration officers, 8 U.S.C. § 1357(g), and sought to give those state officers the same protections from suit that it understood federal immigration officers to enjoy. It provided that such a state officer "shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law." 8 U.S.C. § 1357(g)(8). The reference to a suit against an "*officer or employee* in a civil action brought under *Federal* . . . law," *id.* (emphasis added), is necessarily a reference to *Bivens*. A suit under the FTCA is a suit against the United States, not against an "officer or employee," and does not implicate individual liabilities or immunities. *Id.*

Additionally, in enacting § 1357, Congress was legislating against the backdrop of *Carlson*, 446 U.S. at 19-24, which held that the availability of a remedy under

the FTCA does not preclude a *Bivens* action for the same injury. Thus, rather than displacing a *Bivens* cause of action, Congress manifestly intended the INA to co-exist with *Bivens*. There is no basis for this Court to read the INA to implicitly do what Congress expressly declined to do.

What is more, the INA is not remedial and thus is unlike the statutes that the Court has found provide an adequate alternative to *Bivens*. For example, in *Bush*, the Court found that the "elaborate, comprehensive scheme" of civil-service protections and procedures precluded recognition of a *Bivens* cause of action to redress retaliatory firings in violation of the First Amendment. 462 U.S. at 385. That system, the Court found, "provide[d] meaningful remedies for employees" who claimed to have suffered retaliatory action in violation of the First Amendment. *Id.* at 386.

Likewise, in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Court declined to recognize a *Bivens* action against government officers who allegedly violated due process in denying claims for Social Security disability benefits. The Court pointed to "elaborate" administrative structure and procedures, *id.* at 414, that Congress specifically designed to address problems created by the wrongful termination of disability benefits. In devising that system, Congress "chose specific forms and levels of protection for the rights of persons affected by incorrect eligibility determinations...." *Id.* at 426. Given Congress's careful calibration of this remedial scheme, the Court deferred to Congress's judgment as to how best to "mak[e] the inevitable compromises required in the design of a

massive and complex welfare benefits program." *Id.* at 429.

The Court reached a similar conclusion in a case involving military discipline. There, too, "Congress ... ha[d] established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provide[d] for the review and remedy of complaints and grievances such as those presented by" the plaintiffs. *Chappell*, 462 U.S. at 302.

In contrast to these statutes, the INA is a scheme governing only the admission, exclusion, and removal of noncitizens. Respondents' claims have nothing to do with any of these actions. Nothing in the INA even alludes to conditions of confinement in immigration detention. Nor does the INA provide for the redress of injuries suffered as a result of constitutional violations; the INA simply is not a remedial scheme at all. Immigration courts are powerless to hold federal officers accountable for the suffering, outrage, emotional distress, and humiliation that Respondents allege. *Amici* know of no instance where immigration evidence has been suppressed or proceedings terminated based on allegations concerning conditions of confinement.

Where no alternative remedy is available for the plaintiffs, the Court has denied *Bivens* relief only in the military context, in a decision that expressly relied on the unique disciplinary structure of the military. *See United States v. Stanley*, 483 U.S. 669, 683-84 (1987) (suits by military service members against military officials for injuries arising out of or in the course of activity incident to military service). This Court's twin

military *Bivens* rulings rested specifically on the "special status of the military," *Chappell*, 462 U.S. at 303-04, with its independent system of justice for military personnel and "unique disciplinary structure." *Stanley*, 483 U.S. at 681-84; *Chappell*, 462 U.S. at 303-04. Those concerns are inapplicable to this lawsuit, brought by civilians against civilian immigration officers.

B. There Is No Alternative Remedy Under State Law.

There is no alternative remedy available to Respondents under state law, in contrast to cases such as *Minneci* and *Malesko*. *See Minneci*, 565 U.S. at 129-30 (declining to find a *Bivens* cause of action where state tort remedy was clearly available); *Malesko*, 534 U.S. at 73-74 (same). In *Minneci*, for example, the Court held that a prisoner could not bring a *Bivens* action against employees at a privately run prison, because suit could be brought under state tort law. The availability of that state-law remedy distinguished *Minneci* from a claim against a federal prison official, for which *Bivens* is available. As the Court explained, *Bivens* is needed in latter situation because "[p]risoners ordinarily cannot bring state-law tort actions against employees of the Federal Government." *Minneci*, 565 U.S. at 126. Under the Westfall Act, 28 U.S.C. § 2679(b)(1), the United States would be substituted as the defendant in any state-law suit against Petitioners, and Respondents would be forced to proceed under the FTCA. 28 U.S.C. §§ 1346(b), 2671 *et seq.* And as noted above, the FTCA is not the kind of alternative remedial scheme that can displace a *Bivens* cause of action. *See Carlson*, 446 U.S. at 20-23. The Court held in *Carlson* that "[p]lainly

FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated [a plaintiff] exclusively to the FTCA remedy." *Id.* at 23. As testament to this intent, in enacting the FTCA, Congress twice rejected proposals to eliminate *Bivens*. *See* James F. Pfander & David Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 132-35 & n.100 (2009).

III. No "Special Factors" Counsel Against Recognition of a *Bivens* Cause of Action.

Petitioners' main argument against recognizing a *Bivens* cause of action in this case is that, even if there is no alternative remedial scheme, "special factors" nevertheless counsel against applying *Bivens* here. Ashcroft Br. 23-30; Hasty Br. 29-33. But none of the special factors identified by the Court are present in this case. At bottom, this case involves the abusive mistreatment of detainees in federal custody, including beating detainees and slamming them into walls, and singling them out on the basis of their ethnicity and religion, without any individualized basis whatsoever. There is no policy justification for such unconstitutional abuse, nor have Petitioners advanced any reasoned basis for the infliction of such abuse.

Nevertheless, Petitioners maintain that the national security and immigration aspects of this case, coupled with the involvement of high-level policymaking officials, are "special factors" warranting hesitation in recognizing a *Bivens* remedy here. But vague invocations of policymaking and national security should not defeat judicial review of constitutional violations nor

the right to a remedy. This Court has rejected a version of that same argument before, when it refused to grant absolute immunity to the Attorney General, who was alleged to have ordered an unconstitutional wiretap. *See Mitchell v. Forsyth*, 472 U.S. 511, 521-24 (1985). Courts, moreover, have ample tools at their disposal to address any legitimate and specific national security concerns. The possibility that a case might implicate national security interests is not a reason to foreclose a *Bivens* remedy altogether.

Likewise, the fact that this case involves noncitizens who were in immigration detention is not a "special factor" warranting hesitation. Hundreds of thousands of individuals pass through immigration detention each year. The number may rise if immigration enforcement efforts are increased. It is vitally important that this Court reject Petitioners' contention that this massive detention system can become a zone of immunity in which noncitizens can be subjected to abuse and mistreatment without any remedy. As numerous reported cases demonstrate, the need for deterrence is acute.

A. The "Special Factors" Previously Recognized By This Court Do Not Exist In This Case.

The "special factors" that have led the Court in previous cases to decline to recognize a *Bivens* remedy are not present in this case.

First, the Court has found that "special factors" counsel against a *Bivens* remedy when there is not a judicially manageable standard to adjudicate the alleged

constitutional wrong. Thus, in *Wilkie*, the Court declined to recognize a *Bivens* cause of action to seek redress for the government's alleged retaliation against the plaintiff on account of his exercise of his property rights. 551 U.S. at 562. The Court reasoned that "[a] judicial standard to identify illegitimate pressure going beyond legitimately hard bargaining would be endlessly knotty to work out," and that there would be "serious difficulty [in] devising a workable cause of action." *Id.*

That concern does not apply here. The standards for adjudicating conditions-of-confinement claims in federally owned and operated facilities are well established, and the Court has found no difficulty devising a workable cause of action for conditions-of-confinement suits. *See Carlson*, 446 U.S. at 18-20.

Second, while the Court has found "special factors" to exist in the context of military discipline, the Court reasoned that the "military establishment" has a "unique disciplinary structure," *Chappell*, 462 U.S. at 304, and the integrity of that disciplinary structure is necessary for the military to perform its function. The "special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." *Id.* at 304. Accordingly, allowing *Bivens* suits in that context would be "inappropriate." *Id.*; *see also Stanley*, 483 U.S. at 683-84.

The special factors that informed the Court's holding in *Chappell* and *Stanley* are not present in this case,

contrary to Petitioners' assertion, *see* Hasty Br. at 32-33. The Court in *Chappell* and *Stanley* was focused on the corrosive effect that allowing soldiers to sue their commanding officers could have on military discipline. *Chappell*, 462 U.S. at 300, 303-04; *Stanley*, 483 U.S. at 681-84. That concern does not exist in this case. The military context is, as this Court put it, "unique." *Chappell*, 462 U.S. at 300. Indeed, as noted above, the Court has long recognized the availability of a *Bivens* suit by federal prisoners, despite the need for tight discipline and control of prisons. *See Carlson*, 446 U.S. at 18-20.

B. Federal Officers' Invocation of "National Security" Concerns Is Not a Special Factor Counseling Against a *Bivens* Remedy.

Petitioners assert that high-level policymaking decisions concerning "national security" constitute a special factor weighing against recognition of a *Bivens* action here. The Court should reject that argument, just as it rejected a similar argument made more than thirty years ago in *Mitchell*. In that case, the Court rejected the argument that national security justifies the absolute immunity of government officers against *Bivens* suits. The Court reasoned:

> Built-in restraints on the Attorney General's activities in the name of national security ... do not exist. And despite our recognition of the importance of those activities to the safety of our Nation and its democratic system of government, we cannot accept the notion that restraints are completely unnecessary.... The danger that high federal officials will disregard constitutional

> rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity.

472 U.S. at 523; *see also id.* at 523 n.7 (acknowledging necessity of *Bivens* in cases implicating national security because "declaratory or injunctive relief and the use of the exclusionary rule ... are useless where a citizen not accused of any crime has been subjected to a completed constitutional violation."). The same logic compels rejecting Petitioners' argument here, which, by denying any cause of action to sue, would confer an effective absolute immunity on federal officials.

Because "national security" is a concept with ill-defined boundaries, it is particularly dangerous to allow government officials to enjoy effective immunity from suit whenever the concept can be invoked. As the Court reasoned in *Mitchell*, "[g]iven the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." *Id.* at 523 (quotation marks omitted); *see also* Laura K. Donohue, *The Limits of National Security*, 48 Am. Crim. L. Rev. 1573, 1579-84 (2011) ("'[N]ational security' is rarely defined," and "the term is frustratingly broad, [and can give] rise to important constitutional concerns."). As this Court has put it, "[T]he label of 'national security' may cover a multitude of sins." *Mitchell*, 472 U.S. at 523.

Focusing on the specific national security interests cited by Petitioners makes clear that these interests can be addressed through means more tailored than the wholesale denial of a cause of action. There is no "national security" justification for slamming detainees

into walls, or otherwise subjecting them to the kind of abusive conditions alleged here.

Petitioners Hasty and Sherman argue that local jailers should not be held liable when they blindly accept FBI terrorism designations, Hasty Br. 25, 30, but these designations do not authorize such unconstitutional abuse. Federal officials cannot avoid liability for violations of well-established constitutional rights by asserting that they are just following the orders of policymakers. *See Wesby v. District of Columbia*, 765 F.3d 13, 29 (D.C. Cir. 2014) ("This Court has never held that qualified immunity permits an officer to escape liability for his unconstitutional conduct simply by invoking the defense that he was 'just following orders.'"), *pet'n for cert. filed*, 84 U.S.L.W. 3686 (U.S. June 8, 2016) (No. 15-1485); *Kennedy v. City Of Cincinnati*, 595 F.3d 327, 337 (6th Cir. 2010) ("[S]ince World War II, the 'just following orders' defense has not occupied a respected position in our jurisprudence."). An officer has the "responsibility to decide for himself whether to violate clearly established constitutional rights." *O'Rourke v. Hayes*, 378 F.3d 1201, 1210 (11th Cir. 2004).

Petitioners Ashcroft and Mueller argue that whether Respondents could justifiably be subjected to the abusive conditions of confinement they suffered depends upon a "broad range of national-security considerations" that may force a court to "second-guess high-level executive policies." Ashcroft Br. 27-28. But again, Petitioners offer no conceivable argument that national security would justify the kinds of mistreatment inflicted upon Respondents. Moreover, to the extent

that they maintain that the circumstances rendered their treatment of Respondents either constitutional or not a violation of clearly established rights, those arguments can be considered in the qualified immunity and merits determinations, and do not provide a threshold reason to dismiss all inquiry. *Pearson*, 555 U.S. at 231-32 ("[W]e have made clear that the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against government officials [will] be resolved prior to discovery.") (quotation marks omitted) (second bracket added); *see also Mitchell*, 472 U.S. at 524 (observing that for national security matters, qualified immunity standard protects government officials from being subject to "frivolous and vexatious complaints" while also incentivizing those same officials to "pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States.").

Petitioners also contend that these cases may involve classified or sensitive information. Hasty Br. 30. But the courts have numerous tools for handling litigation involving classified or sensitive matters without unduly interfering with the Executive's intelligence-gathering activities. Indeed, federal courts routinely consider matters that implicate "national security," including by adjudicating the factual and legal bases for detention of citizens designated as enemy combatants, *Hamdi*, 542 U.S. at 509, adjudicating habeas petitions brought by alleged enemy combatants, *Boumediene v. Bush*, 553 U.S. 723, 732 (2008), and adjudicating constitutional claims, *Webster v. Doe*, 486 U.S. 592 (1988).

One such tool is the state-secrets privilege, under which the government may refuse to disclose information sought in discovery if the disclosure might reasonably jeopardize national security. *See United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). Courts can also "evaluate classified and sensitive evidence while maintaining secrecy" by receiving that evidence under seal, and courts can "issue opinions without disclosing that evidence." *Meshal v. Higgenbotham*, 804 F.3d 417, 446 (D.C. Cir. 2015) (Pillard, J., dissenting), *pet'n for cert. filed*, 84 U.S.L.W. 3675 (U.S. May 31, 2016) (No. 15-1461). Court personnel and counsel can be required to obtain security clearances, and "[c]ourts can assign codes or aliases in a case to enable witnesses to testify about secret matters in a way which the judge, jury, and attorneys will understand, but the public will not." *Id.*; *see also* Federal Judicial Center, *National Security Case Studies: Special Case-Management Challenges* (June 25, 2013). In sum, "the District Court has the latitude to control any discovery process which may be instituted so as to balance [a plaintiff's] need for access to proof which would support a colorable constitutional claim against ... [the government's] need[] ... for confidentiality and the protection of its methods, sources, and mission." *Doe*, 486 U.S. at 604.

Petitioners Ashcroft and Mueller additionally contend that the court room doors are closed to a *Bivens* suit challenging "[h]igh-level policy decisions." Ashcroft Br. 24. But this suit does not challenge a policy decision in the abstract; it challenges the decision to authorize the harsh, unconstitutional abuse of the specific individuals who have brought suit. After all,

"[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Malesko*, 534 U.S. at 70; *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) ("It must be remembered that the purpose of *Bivens* is to deter *the officer*."). And this Court has emphasized that even cabinet-level officers should not be absolutely immune when they violate the Constitution, even where they claim the violation was committed in the name of national security. *Mitchell*, 472 U.S. at 521-24. Indeed, the deterrence of constitutional violations through *Bivens* actions becomes even more important when those violations are the result of a systemic and organized policy—particularly when suits seeking prospective injunctive relief may be difficult to bring because of limitations on standing. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

Thus, if federal officials authorized the punitive and discriminatory treatment alleged in this case, *Bivens* should provide a remedy for their unconstitutional conduct—just as the Attorney General in *Mitchell* was not immune "from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions." *Mitchell*, 472 U.S. at 520.

C. The Immigration Context Is Not a Special Factor Counseling Against a *Bivens* Remedy.

Petitioners also contend that the "implication of 'immigration issues'" is a "special factor" weighing against a *Bivens* cause of action. Hasty Br. 32; *see also* Ashcroft Br. 18, 29-30. But "immigration issues" are not implicated by the conditions of confinement imposed

upon Respondents. Petitioners' argument would leave any noncitizen in immigration detention without recourse for even the most egregious violations of constitutional rights, such as those alleged here. There is no reason why immigration detainees should lack the same access to judicial remedies for violations of clearly-established constitutional rights that any other detainee has.

Moreover, the immigration detention system holds hundreds of thousands of individuals each year. The possibility of *Bivens* suits against federal officers—like the possibility of state-law tort actions against employees of privately run immigration detention facilities—is essential to deter abuses. Numerous reported cases document shockingly abusive treatment by federal officers toward noncitizens in their custody. *See, e.g.*, *Martinez-Aguero*, 459 F.3d at 620-21 (holding that border patrol agent was not entitled to qualified immunity for yelling profanities while repeatedly kicking a handcuffed woman in the back and pushing her against a concrete wall, triggering epileptic seizures); *Estate of Hernandez-Rojas ex rel. Hernandez v. United States*, 62 F. Supp. 3d 1169, 1172-73, 1188 (S.D. Cal. 2014) (denying summary judgment motion where plaintiffs presented sufficient evidence that border patrol agents' physical abuse of detained Mexican national—including evidence that the detainee was repeatedly punched, kicked, and stepped on—"[was] a substantial factor in causing [the detainee's] injuries and death"); *Jama v. U.S. INS*, 334 F. Supp. 2d 662, 666 (D.N.J. 2004) (asylum seekers alleged they were "tortured, beaten, harassed" and "subjected to abysmal living conditions" in

detention); Order, *Diouf v. Chertoff*, No. 07-03977 (C.D. Cal. May 6, 2008), ECF No. 82 (damages action under *Bivens* and FTCA by non-citizens who were forcibly drugged with powerful anti-psychotic medications during attempts to remove them); Complaint, *Doe v. Neveleff*, No. 11-cv-00907 (W.D. Tex. filed Oct. 19, 2011), ECF No. 1 (*Bivens* claim by three female asylum-seekers on behalf of a class, seeking redress for sexual assault while in ICE custody). Petitioners' argument would effectively immunize all of this misconduct from suit.[2]

Although the immigration agencies do have internal disciplinary procedures, their internal discipline has been toothless. For example, a study by the American Immigration Council covering 809 complaints of alleged abuse lodged against border patrol agents between January 2009 and January 2012 revealed that, in an astonishing 97% of cases resulting in a formal decision, no action was taken. Over 75% of these cases involved

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[2] American citizens also are affected when CBP and ICE officials are permitted to act with impunity. U.S. citizens have been detained and, in some cases, removed, by immigration officials. *See, e.g., Castillo v. Skwarski*, No. 08-5683, 2009 U.S. Dist. LEXIS 115169 at *2-*11, *16 (W.D. Wash. Dec. 10, 2009) (U.S. citizen veteran, detained for over seven months and ordered removed, brought *Bivens* suit); Order, *Guzman v. United States*, No. CV 08-01327 GHK (C.D. Cal. May 11, 2010), ECF No. 170 (American citizen with mental disability who was detained and removed, settled damages suit); Complaint, *Riley v. United States*, No. 00-cv-06225 ILG/CLP (E.D.N.Y. Oct. 17, 2000), ECF No. 1 (*Bivens* and FTCA claims for unlawful detention, shackling and strip search of lawful permanent resident upon return to U.S., settled for monetary damages).

allegations of physical abuse or excessive force. *See* American Immigration Council, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse* 1, 4, 8 (2014), http://tinyurl.com/z9ay4k9. And it is likely that the vast majority of cases go unreported: victims and their families—many of whom are without formal education, face language barriers, or lack legal sophistication—are not well-positioned to ensure that these internal processes are effective at remedying misconduct by federal officers.

This Court's recognition that the political branches exercise plenary power over the admission and exclusion of noncitizens, *see Galvan v. Press*, 347 U.S. 522, 530 (1954), also does not counsel against a *Bivens* remedy. The claims in this case do not involve the admission or exclusion of noncitizens; they involve the conditions of confinement imposed on foreign nationals in federal custody. Whatever else it may cover, the plenary power doctrine has never been interpreted to justify physical abuse of foreign nationals in federal custody.

Moreover, even if plenary power were relevant here, this Court has long recognized that its exercise is still "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (instructing that plenary power over immigration is restricted in its exercise "by the [C]onstitution itself."). Where constitutional rights are violated, *Bivens* should provide a remedy.[3]

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[3] In other contexts in which Congress exercises plenary power, Courts of Appeals have not hesitated to allow *Bivens* claims. For

Congress also has a strong national interest in deterring such mistreatment of foreign nationals by allowing *Bivens* suits. In *Arizona v. United States*, 132 S. Ct. 2492 (2012), the Court "reaffirmed that '[o]ne of the most important and delicate of all international relationships ... has to do with the protection of the just rights of a country's own nationals when those nationals are in another country.'" *Id.* at 2498-99 (citation omitted) (bracket in original). The perceived mistreatment of foreign nationals located in the United States "may lead to harmful reciprocal treatment of American citizens abroad." *Id.* at 2498. The same logic applies with equal force to the actual mistreatment by federal agents of foreign nationals in detention. To selectively deny any remedy to such foreign nationals when U.S. citizens would be entitled to sue under *Bivens* undermines Congress's interest in the just treatment of U.S. citizens abroad.

Finally, rejecting Petitioners' argument that immigration is a "special factor" would not open the floodgates to a new type of *Bivens* claim. Several Courts

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example, the Eighth Circuit allowed a *Bivens* claim against a Bureau of Indian Affairs officer to proceed, *Wilkinson v. United States*, 440 F.3d 970, 971 (8th Cir. 2006), even though Congress exercises plenary power over the affairs of Native Americans, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Similarly, a *Bivens* suit against patent officers withstood a claim of absolute immunity in the Fourth Circuit, *Goldstein v. Moatz*, 364 F.3d 205, 211-19 (4th Cir. 2004), even though Congress has plenary power to "to legislate upon the subject of patents," *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843). The military context, *see Stanley*, 483 U.S. at 681-84, is unique for the reasons described above, *see supra* at 14-15.

of Appeals already have recognized the availability of a *Bivens* cause of action in the immigration context. *See, e.g., Martinez-Aguero*, 459 F.3d at 625 (involving false arrest and excessive force against Mexican woman near U.S. port of entry); *Franco-de Jerez*, 876 F.2d at 1039, 1042-43 (allowing case to proceed to discovery against immigration officer on *Bivens* claim where noncitizen was held incommunicado for over ten days); *Ysasi v. Rivkind*, 856 F.2d 1520, 1528 (Fed. Cir. 1988) (vacating grant of summary judgment in favor of border patrol agents in *Bivens* action based, in part, on lack of showing that alternative remedies were available and equally effective); *Jasinski v. Adams*, 781 F.2d 843, 845-46 (11th Cir. 1986) (affirming denial of summary judgment in *Bivens* challenge to detention and search by immigration officer); *Guerra v. Sutton*, 783 F.2d 1371, 1375-76 (9th Cir. 1986) (vacating and remanding dismissal of *Bivens* claims against border patrol agents on qualified immunity grounds); *Tripati v. U.S. INS*, 784 F.2d 345, 346 n.1 (10th Cir. 1986) (finding civil rights action against immigration officer properly brought under *Bivens*)); *accord Ballesteros v. Ashcroft*, 452 F.3d 1153, 1160 (10th Cir. 2006) ("No remedy for the alleged constitutional violations would affect the BIA's final order of removal. Any remedy available to Mr. Ballesteros would lie in a *Bivens* action."); *Matter of Sandoval*, 17 I. & N. Dec. at 82 (citing *Bivens* for the proposition that "civil or criminal actions against the individual officer may be available"). In the thirty years since the first of these decisions, there has been no resulting deluge of meritless cases or interference with the government's ability to enforce the immigration laws.

* * *

"[H]istory and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse." *Hamdi*, 542 U.S. at 530. For decades, *Bivens* has been an indispensible part of a framework of accountability for extreme misconduct by government officials. This Court should reject Petitioners' invitation to insulate government officials from accountability for constitutional violations whenever the talisman of policymaking, national security, or immigration can be invoked.

CONCLUSION

For the foregoing reasons, and those set forth in Respondents' brief, the Court should hold that a *Bivens* cause of action is available to Respondents.

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Respectfully submitted,

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